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IN THE

SUPREME COURT OF THE UNITED STATES

____ TERM

Misc. No. .....

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

901.89 ACRES OF LAND IN DAVIDSON AND RUTHERFORD COUNTIES TENNESSEE, AND H. E. JOHNSON, ET AL., LAWRENCE C. DAVENPORT, ET UX., TRACT 1209,
Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The Petitioners, Lawrence C. Davenport and wife, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in Case No. 20169, of that Court, on December 22, 1970.

OPINION BELOW

A Commission appointed pursuant to Rule 71 A(h) of the Federal Rules of Civil Procedure appointed by the United States District Court for the Middle District of Tennessee, Nashville Division, tried the issue of just compensation in this land condemnation case and rendered its report and findings on January 10, 1969. On September 9, 1969 the United States District Court, the Honorable William E. Miller, entered an Order overruling exceptions and objections filed by the United States to the report and findings of the Commission and approving the same in all respects and fixing the measure of just compensation to which the landowners are entitled in this action at the figure of $72,400.00.

Thereafter the United States perfected a timely appeal to the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals for the Sixth Circuit entered an opinion on December 22, 1970 reversing the United States District Court for the Middle District of Tennessee, Nashville Division, and specifically disapproving in all respects of the findings of the Commission and remanding the cause to the District Court with the specific directions that a judgment be entered in this cause fixing the just compensation to which the landowners are entitled at the sum of $50,000.00.

The opinion of the Court of Appeals reversing and remanding the judgment of the District Court is reported at ... F.2d .... A copy of this opinion is appended hereto as Appendix A, (page 16).

STATEMENT OF JURISDICTION

The jurisdiction to review the judgment is conferred on this Court by Title 28, U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

1. May a Court of Appeals of the United States try the question of just compensation *de novo*, test the credibility of witnesses appearing before a Commission duly appointed, comment upon the evidence presented, reverse the United States District Court and the Commission appointed by it, and in every respect totally try the question and issue of just compensation?

2. In a condemnation case, where there is a partial taking of a tract of land, may the benefits, if any, accruing to the remainder be characterized as "general" and "special and direct"?

3. If benefits may be so characterized is there a difference in these benefits?

4. May the United States in a condemnation case present only proof in an amount less than estimated just compensation previously paid into Court at the trial of the cause on the issue of just compensation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States of America, Amendment Five.

"nor shall private property be taken for public use, without just compensation."

Title 28, U.S.C. Code Section 2106, Determination. The Supreme Court or any other Court of appellate juris-

diction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a Court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF THE CASE

This case was tried before a Commission duly appointed by the United States District Court for the district where the property condemned is located. The property condemned was for the purpose of the J. Percy Priest Reservoir and Dam Project of the U. S. Army Corps of Engineers, located near Nashville, Tennessee. As the record herein will reflect the Commission was appointed to try the issue of just compensation and to try this issue alone. The findings of this Commission are to be binding upon all parties to the action unless "clearly erroneous." *United States v. Trout*, 386 F.2d 216, 223 (5th Cir. 1967).

After trial of the issue of just compensation, with both sides to the litigation represented by counsel, after the introduction of evidence by both sides pertaining to just compensation, after an on the premises inspection of the property by the Commission, and after the commission had an adequate and full opportunity to review the record of the proceedings as reported by the court reporter, the Commission made a report outlining in detail the basis for its decision as to just compensation.

Thereafter the United States District Court, the Honorable William E. Miller, District Judge, carefully examined the exceptions of the United States in light of the transcript of the proceedings before the Commission, briefs of counsel, the report of the Commission itself, and the entire

record and found the exceptions filed by the United States without merit and overruled such exceptions and confirmed the report of the Commission in every detail fixing the just compensation to which the landowners are entitled at the sum of $72,400.00.

Thereafter the United States appealed the final order of the District Court to the United States Court of Appeals for the Sixth Circuit.

Your petitioners must respectfully call the attention of this Honorable Court to the entire opinion issued by the United States Court of Appeals for the Sixth Circuit. Petitioners believe that a reading of that opinion will bring the reader to only one conclusion, that being that the Sixth Circuit Court of Appeals *tried* the issue of just compensation *de novo*.

The United States Court of Appeals for the Sixth Circuit, through Judge O'Sullivan, tested the credibility of witnesses, the qualifications of witnesses, the frankness of the witnesses and commented at length upon the weight to be given the testimony of each of the witnesses called.

The Court of Appeals in its opinion in this cause, speaking of the expert witness called by the landowner stated:

"We share the Commission's view that this witness' testimony was obviously worthless."

At no point in the Commission's report or in the order of the District Court was there any view expressed or finding made that the expert witness called by the landowner presented worthless testimony. As a matter of fact at Page 10 of the Court of Appeals opinion in this cause the Court quoted from the Commission's report as follows:

"The Commission finds Mr. Beck to be a fairly well-informed witness, but deems his estimate as to value to be overly enthusiastic in this case."

Again your petitioners would urge upon this Honorable Court that it is not the province of a reviewing Court, as was done in this case, to try *de novo* any case properly brought before it for review.

In *Bankers Life and Casualty Company v. Kirtley*, 307 F.2d 418, 422 (8th Circuit 1962), the Court said:

"In determining the sufficiency of the evidence to support the verdict, we must view the evidence in the light most favorable to the prevailing party, giving such party the benefit of all inferences that may reasonably be drawn from the evidence. Citing *Ford Motor Company v. Mondragon*, 271 F.2d 342, 345, 8th Circuit; *Clinton Foods, Incorporated v. Youngs*, 266 F.2d 116, 8th Circuit.

In *United States v. Benning*, 330 F.2d 527 (8th Circuit 1964), certiorari denied 279 U.S. 916, a case strikingly similar to the instant case in that a Commission tried the issue of just compensation, made a report to the District Court, which such report the District Court accepted and approved in all respects and from which such approval the United States appealed; the Court said:

"At the outset we are faced with a dispute as to the function which this Court is to perform on appeals of this sort. Appellees assert that our function is to review the manner in which the District Court has acted upon the objections filed to the report and findings of the Commission; rather than of those of the Commission. The United States, on the other hand, asserts that our function is to review the Commission's report de novo.

"Upon this dispute we agree with the position of the Appellees.

"As we view the matter should we take upon ourselves a de novo review of the Commission we would rob the District Court of all significant participation in the case. Further, we would undertake for this Court the burden of ascertaining, as in the first instance and in the light of the full record, whether the Commission's findings are clearly erroneous in the specified respects.

"That burden, in our view, must remain with the District Court. Our function is the more restricted one of determining, under a proper assignment of errors, whether the District Court has committed error or has otherwise failed in its judicial function in the manner in which it has resolved the disputes raised by the objections filed with it."

Your Petitioners would most respectfully insist that the actions of the Court of Appeals in trying this case de novo was error.

Your Petitioners now would invite the Court's attention to the second proposition as to the distinction between "general benefits" and "special benefits" which may accrue to the remainder of the property after a partial taking by the United States.

Congress saw fit to codify and define the distinction between "special" and "direct" benefits and "general" benefits at 33 U.S.C. Section 595. This codification was merely a restatement of what the law has been all along.

The Commission in the instant case determined that the benefits, if any, accruing to the remainder of your Petitioner's property were general in nature and not the type that could be deducted from the compensation due the landowners for the property taken and the damages incident thereto. The Court of Appeals in its opinion at Page 6 said:

"We consider that the Commission erred factually and legally in coming to such conclusion."

Petitioners would urge that the Court erred in making such a determination based upon the record before it, without a remand to the District Court with instructions for clarification as to the finding of "general benefits" as opposed to "special benefits."

It is undisputed in the record in this cause that the remainder of the property belonging to the Petitioners is approximately 500 feet from the edge of the Reservoir and that the United States bought the fee simple title to all property contiguous to the high water mark of the Reservoir for about 300 feet up the bank so that no property owner in close proximity to the Reservoir would have any access to the lake except by trespass across Government lands or by going to one of the public access areas provided at the Reservoir for the general public. Your Petitioners, and whoever they may sell to in the future, have no access to this Reservoir which is not available to the general public. The record also reveals that the Reservoir can only be seen from one small corner of the remaining property.

The question of "general benefits" and "special benefits" was considered at length and discussed at length by the Commission trying the measure of just compensation and the parties were requested and did submit exhaustive briefs to the Commissioners on this very point.

In *United States v. 2477.79 acres of land, et cetera*, 259 F.2d 23, Fifth Circuit 1958, that Court undertook to define "general" and "special" benefits.

"General and special benefits have been thus distinguished:

"'The most satisfactory distinction between "general" and "special" benefits is that "general" benefits are those which arise from the fulfillment of the public object which justify the taking and "special" benefits are those which arise from the peculiar relation of the land in question to the public improvement.....'

"'We think that "special" benefits are those which are direct and peculiar to the particular property as distinguished from the incidental benefits enjoyed to a greater or less extent by the lands in the area of the improvement.'"

This Honorable Court in an older case, *United States v. River Rouge Improvement Company*, 269 U.S. 411, 46 Supreme Court 144, 70 Lawyer's Edition 339 (1926) said:

"The kind of benefit which is not allowed to be estimated for the purpose of such deduction, is that which comes from sharing in the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity by reason thereof....."

A Ninth Circuit case in 1935, *United States v. Alcorn*, 80 F.2d 487, gave us the following language:

"We are satisfied that the increase of value to the defendant's property due to its proximity to the great project, while different from that enjoyed by owners of more remote land, is not a special or direct benefit to the land not taken within the meaning of the applicable statute fixing the measure of just compensation to be awarded for land taken by condemnation by the Government of the United States for river and harbor improvements. 33 U.S.C.A. Section 595, supra.

"The Government points out no special benefit to the remaining four acres and offered no proof upon it, hence, we content ourselves with a reference to the decision of the

Supreme Court in *U. S. v. River Rouge Improvement Company*, 269 U.S. 411, 415, 46 Supreme Court 144, 70 Lawyer's Edition 339, in which the difference between 'general' and 'special' benefits from a public improvement is pointed out."

Again in *United States v. Trout*, 386 F.2d 216 (1967) "general" and "special" benefits were defined and "special" benefits in that case were for the following reason:

"It is the distinct benefit to the remainder caused by its prospective frontage on the water that must be offset against recovery for land taken."

In our present case, there was not one word of proof offered by the United States as to any special benefits which your Petitioners might expect to accrue to the remaining portion of their property. The remaining portion of Petitioner's property does not front on any different roadways than were available before the Government project began. The remainder of Petitioner's property does not front on the water and in fact is some 500 feet from the lake and has no access to the lake at all except by trespass across Government owned land. Both the landowner's appraiser and the Government's appraiser agreed that before the date of taking the highest and best use of the landowner's property was for small tract home sites and that after the date of taking the remainder of the property still had this basis for its highest and best use.

The Commission which tried just compensation in the instant case rejected the Government's contention that your Petitioner's property enjoyed any special benefits as a result of the Government project. It must be pointed out that these Commissioners had an opportunity to see and hear in person the witnesses for the two sides of this controversy and actually made an on the sight inspection of this property prior to trial.

At no point in any of the proceedings concerning your Petitioner's property has anyone pointed out what benefit your Petitioner's remaining property enjoys as a result of the Government project.

The Sixth Circuit Court of Appeals did, however, try de novo the question of "special" and "general" benefits and concluded:

"We consider that the Commission erred factually and legally in coming to such conclusion."

This statement has reference to the fact-finders' conclusion that the benefits, if any, to your Petitioner's remaining property were general in nature.

Your Petitioners would urge upon this Honorable Court that if the Government intends to charge a property owner's remaining portion of land after a partial condemnation with "special" benefits allegedly accruing to the remaining portion that the United States has an absolute obligation by direct proof to show what "special" benefit the remaining property has acquired by reason of the Government project. To do otherwise is manifestly unjust and unfair in that it charges a particular landowner, who in most instances has already lost his home, as in this case, and other real estate, with bearing a disproportinate share of the cost of the Government project.

Your Petitioners would urge that it was error for the Court of Appeals to try de novo the question of "general" and "special" benefits, but that assuming that it was proper there was nothing in the record compiled in the trial of this case which should allow the United States to offset special benefits against these Petitioners.

If indeed there is a distinction between "general" and "special" benefits, and this Court has held that there is,

United States v. River Rouge Improvement Company, supra, and the Government intends to insist in any particular case that the remaining portion after a partial condemnation enjoys special benefits then the United States must present positive proof as to what those special benefits are, and the value of the benefits.

It must also be pointed out at this time that the appraiser who testified for the United States in this case before the Commission had never seen any of the property condemned for this particular project until he was transferred into the Nashville area by the U. S. Army Corps of Engineers from the State of Missouri for the specific purpose, and for that purpose alone, of appraising property in this area. The appraiser for your Petitioners has maintained a real estate sales office and appraisal service in Middle Tennessee for many, many years and was completely familiar with the general land values in this area both before and after the Government commenced this project.

The final question which your Petitioners would raise in this Honorable Court concerns a point which your Petitioners verily believe to be manifestly unjust and unfair in this and all other cases in which it is done.

In the instant case, the record will reveal, the United States paid into the Registry of the District Court the sum of $52,500.00 as estimated just compensation. At the trial before the Commission on just compensation the Government appraiser testified that your Petitioners' damage for the land taken and the incidental damages, if any, to the remainder had a value of $50,000.00. This sum is $2,500.00 less, of course, than had been previously paid into Court by the Government.

On April 8, 1966 there was filed in the District Court a notice addressed to your Petitioners that a condemnation

suit had been filed against their property, a copy of which notice was forwarded to your Petitioners. Stapled to this notice was a letter signed by Gilbert S. Merritt, Jr., United States Attorney, stating in part as follows:

"On 4-5-66 there was filed in the proceeding a Declaration of Taking declaring that the fee simple title (or such less or temporary interest as the case may be) to the above described land has been taken by the United States and at the same time there was deposited into the Court the sum of $52,500.00, the amount estimated to be just compensation for your land. While this estimation is based upon appraisals made by appraisers and real estate men believed to be competent and qualified, it is not binding upon either you or the Government and the exact amount to be paid for the taking of your land will be determined either by agreement or by trial or hearing and proceeding."

The balance of the letter directed your Petitioners as to how they could withdraw the funds on deposit in the Court.

Your Petitioners do not know who the appraisers referred to in the letter were who fixed the value at $52,500.00, but they certainly do know that these persons were not called as witnesses by the United States in the trial of this cause.

The only witness called by the Government testified that the value was $50,000.00.

More important in the paragraph of the letter quoted is the veiled threat by the United States, which at trial became a reality, that if your Petitioners did not accept this amount of money for their property they could expect the United States to present proof that the property was actually worth less than that amount. That is exactly what happened.

When a landowner does not contest the condemning authorities right to take property then the only issue for trial

is the measure of just compensation. While in some respects this type hearing is an adversary proceeding it certainly should never take on the attributes of a trial wherein the question of liability, whether anything is owed or not, is disputed, and must be resolved before the measure of damages is reached.

The Government should afford the landowner a copy of the appraisals made of his property. The record in this cause reflects that there was at least one other appraisal of your Petitioners' property made. That witness was not called by the Government and was unknown to the Petitioners prior to the hearing before the Commission.

The fundamental question involved is one of basic fairness to an individual landowner confronted by the power, money and authority of the United States Government. Intimidation and bullying by the Government, which individuals support with their taxes, is not becoming and in an instance such as this is unfair and unjust.

The United States should be compelled to present the trier of just compensation all of the evidence which it has accumulated bearing upon the measure of just compensation due an individual landowner. The Government has no responsibility in a condemnation case to try to acquire the property of an individual as cheaply as possible, but has an obligation on the other hand to insure that that individual gets every penny that he is entitled to.

Your Petitioners feel that the basic theory underlying eminent domain proceedings is that the landowner has the right to be made whole; to be put in as good a pecuniary position as he would have been in if his property had not been taken. This approach frames the question in terms of "what has the owner lost, not what has the taker gained." When the interests of society are balanced against those of

the condemnee, it seems clear that there is no compelling justification for not completely indemnifying the landowner for his loss.

A landowner who has been dispossessed by condemnation and has had his living and life style completely altered by the condemnation is entitled to every consideration which "just compensation" entails. The landowner whose property is taken should not be dealt with by the Government as an adversary but should be granted every reason and every right to know the basis for the Government's position as to just compensation for his property and should be afforded every opportunity based upon that information to be allowed to present countervailing opinions as to the value of his property so that the trier of fact may have complete, full and fair information and all of the opinions which have been submitted concerning the value of the property condemned and the "just compensation" to be paid therefor.

Your Petitioners verily believe and would urge upon this Court that this is a proper case for review in this Honorable Court.

RELIEF

For all of the foregoing reasons, your Petitioners respectfully submit that the Writ of Certiorari should be granted in this case.

Respectfully submitted,

NORMAN D. LANE,
214 3rd Avenue North,
Nashville, Tennessee,

Attorney for Petitioners.

APPENDIX A

NO. 20169

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

901.89 ACRES OF LAND IN DAVIDSON AND RUTHERFORD COUNTIES, TENNESSEE, AND H. E. JOHNSON, ET AL.,
Defendants-Appellees.

APPEAL from the U. S. District Court for the Middle District of Tennessee.

Decided and Filed December 22, 1970

Before Phillips, Chief Judge, Brooks, Circuit Judge, and O'Sullivan, Senior Circuit Judge.

O'Sullivan, Senior Circuit Judge. This appeal involves 144.80 acres of the acreage set out in the title. They were owned by appellees Lawrence Davenport and his wife and were taken through condemnation by the United States. The land was taken preparatory to construction, in Tennessee, of the J. Percy Priest Dam and the impounding of J. Percy Priest Lake behind the Dam. The United States appeals from judgment entered in the United States District Court for the Middle District of Tennessee which confirmed the report of a Commission, appointed under Rule 71A(h), Fed.

R. Civ. P. The Commission awarded appellees $72,400 as compensation for the taking of their land.

We reverse and remand.

[fol. 2] At the time of the taking, April 5, 1966, appellee Davenport owned 218.80 acres, 49 of which he had purchased in 1965 after plans for the project had been announced and negotiations by him with the government had commenced. Prior to this purchase, Davenport owned a parcel of approximately 170 acres, one boundary of which would abut the government's project. It was proposed that the government would take substantially 144.80 acres of this parcel, leaving Davenport with 24.85 acres. This remnant would be landlocked, without access to any highway. The 49 acre tract purchased by Davenport adjoined the 24 acre remainder and also abutted a highway on one side. After the government took 144.80 acres, Davenport was left with a 74 acre tract which was contiguous to the government project and also had access to the highway. No private lands were to front on the lake, but Davenport's remainder, like some others, would overlook the lake with an unobstructed view.

The award of $72,400 was arrived at by ascribing a value of $97,000 to the total 218.80 acres owned by Davenport (including the recently acquired 49 acre parcel) on the day of the taking, or approximately $443 per acre, and putting a value of $24,600, or approximately $330 per acre, on the 74 acres retained by Davenport. This latter amount was deducted from the value of the whole, resulting in the award of $72,400.

The government correctly states as a question for review the following:

"1. Whether, in determining just compensation for a partial taking of land, project-created enhancement in the market value of the remainder, which is contiguous to the project, may be disregarded."

1. Enchanced value of the condemnees' retained and contiguous lands.

An appraiser, testifying for the government, valued Davenport's 218.80 acre tract at $80,000, or [fol. 3] about $365 per acre, as of the day of the taking. That was its market value without any enhancement because of its proximity to the already projected development of the J. Percy Priest Dam and Lake. The witness was qualified and buttressed his valuation by referring to comparable sales. He then valued the 74 acres, title to which would remain in Davenport, at $30,000 or about $404 an acre. In valuing this remainder, he gave consideration to the enhancement that would accrue to it from its proximity to the lake and the advantage of an unobstructed view thereof. Deducting this $30,000 from the $80,000 value placed on the entire tract, he came up with a figure of $50,000 representing the fair compensation that should be paid to Davenport. This appraiser's method was correct.

It is familiar law that in fixing compensation for land that the government takes by condemnation, no amount may be added for the enhancement of value that is the product of the projected public improvement. In *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 57 L. Ed. 1063 (1913), the rule was stated:

"Neither can consideration be given to probable advancement in the value of such riparian property by reason of the works to be constructed in the river by the gov-

ernment, or the use to which the flow of the stream might be directed by the government. The value should be fixed as of the date of the proceedings, and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken, and *not as enhanced by the purpose for which it was taken*. Kerr v. South Park Comrs., 117 U.S. 379, 387, 29 L. Ed. 924, 927, 6 Sup. Ct. Rep. 801; Shoemaker v. United States, 147 U.S. 282, 304, 305, 37 L. Ed. 170, 186, 187, 13 Sup. Ct. Rep. 361." 229 U.S. at 76, 57 L. Ed. at 1080-81. (Emphasis supplied.)

This continues to be the rule. *United States v. Miller*, 317 U.S. 369, 373-75, 87 L. Ed. 336, 342-44 [fol. 4] (1943); *United States v. Reynolds*, 397 U.S. 14, 16-18 (1970). The Commission's report does not say whether it did or did not follow such rule. It found the market value of Davenport's entire acreage to be $97,000. This value does not conform to any appraisal provided by any witness.

Appellees had the burden of proving the fair market value of the condemned land. *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 273, 87 L. Ed. 1390, 1396-97 (1943); *United States v. 1291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969). Both witnesses for the appellees, Davenport himself, and his expert, erroneously based their valuations on the original 170 acre tract and 24 acre remainder. Davenport said his 170 acres, including the 24 acres not taken, was worth $155,000. He did not attempt to claim that such was its market value, and the Commission gave it no consideration. Appellee's expert, John J. Beck, came up with a figure of $108,000 for the same 170 acres. We have no way of knowing how the Commission arrived at its value of $97,000. Its re-

port does not advise whether it did or did not add anything to the value of the land taken because of its proximity to the government project. If it did, it committed error. The Commission's failure to reveal the basis of its valuation of the entire tract before taking, leaves us without any means of testing the validity of its conclusion. *United States v. Merz*, 376 U.S. 192, 198 (1964).

In putting a value of $24,600 on the retained 74 acres, the Commission refused to add any amount for enhancement of the value of the said acres resulting from their proximity to the public improvement. The government appraiser did consider such enhancement. This was proper. In 1918 Congress enacted a statute, now codified in Chapter 12 of the Code as Title 33 U.S.C. § 595. It reads:

"*Consideration of benefits in assessing compensation.*"

"In all cases where private property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals,
[fol. 5] or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, where a part only of any such parcel, lot, or tract of land shall be taken, the jury or other tribunal awarding the just compensation or assessing the damages to the owner, whether for the value of the part taken or for any injury to the part not taken, shall take into consideration *by way of reducing the amount of compensation or damages any special and direct benefits to the remainder arising from the improvement, and shall render their award or verdict accordingly.*" (Emphasis supplied.)

This statute was primarily a codification of what had long been the law of federal condemnation. The philosophy of the rule was early announced in *Searl v. School District No. 2*, 133 U.S. 553, 562, 33 L. Ed. 740, 746 (1890), where the Supreme Court said of the power of eminent domain:

> "It cannot be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, *but to the public which is to pay for it.* Garrison v. New York, 88 U.S. 21, Wall 196, 204 [22:612, 614] Kohl v. United States, 91 U.S. 367, 371 [23:449, 450]." 133 U.S. at 562, 33 L. Ed. at 746.

The rule of law now embodied in an Act of Congress is designed to put the owner in as good position *pecuniarily* as he would have been had his property not been taken. If the taking has, in fact, benefited a remainder not taken, such accruing benefit is to be set off against the value of the land actually taken in determining just compensation. *United States v. Miller*, 317 U.S. 369, 373, 376, 87 L. E. 336, 342, 344 (1943).

The Commission, however, here refused to countenance any deduction for the benefits accruing to the
[fol. 6] remainder,

> "because * * * the benefits of the Percy Priest Dam and Reservoir Project were *general only* with regard to the remaining property of the landowner [appellee] and that they were not special benefits."

We assume that they considered the enhancement of the value of Davenport's retained 74 acres could not be looked

upon as the "special and direct benefits to the remainder" that 33 U.S.C. § 595 requires to be taken into consideration.

We consider that the Commission erred factually and legally in coming to such conclusion. The only testimony on the point came from the government's appraiser who testified in effect that the 74 acres remaining in Davenport were directly and specially benefited because of their proximity to the lake and their view thereof. He supported his evaluation of such benefits by citing some sales of parcels benefited in the same manner as Davenport's acreage. There was no evidence of a *general* enhancement of all properties near to, or remote from, the dam and lake site.

This difference between so-called *general* benefits and *special and direct* benefits was set out in *United States v. 2,477.79 Acres of Land*, 259 F.2d 23 (5th Cir. 1958), where the Court quoted approvingly the following:

> "'The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, *and special benefits are those which arise from the peculiar relation of the land in question to the public improvement*. Ordinarily the foregoing test is a satisfactory one, though sometimes difficult to apply. In other words, the general benefits are those which result from the enjoyment of the facilities provided by the new public work and from the increased general prosperity resulting from such enjoyment. The special benefits are ordinarily merely incidental and may result from physical changes in the land, *from proximity* [fol. 7] *to a desirable object*, or in various other ways. 3 Nichols on Eminent Domain, 3d Ed., 45, § 8.6202.'" 259 F.2d at 28. (Emphasis supplied.)

Some increase in value of the entire area would not detract from that coming to Davenport being appropriately recognized as direct and special. In *United States v. River Rouge Imp. Co.*, 269 U.S. 411, 70 L. Ed. 339 (1926), the Supreme Court considered the subject we deal with and said:

> "We are of opinion that an increase in the value of the remaining portion of any parcel of land caused by its frontage on the widened river, carrying a right of immediate access to and use of the improved stream, *would constitute a special and direct benefit within the meaning of the statute*, as distinguished from a benefit common to all the lands in the vicinity, although the remaining portions of other riparian parcels would be similarly benefited. * * * In Allen v. Charlestown, 109 Mass. 246, the rule is thus stated: '*The benefit is not the less direct and special to the land of the petitioner because other estates upon the same street are benefitted in a similar manner.* The kind of benefit which is not allowed to be estimated for the purpose of such deduction is that which comes from sharing in the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity by reason thereof * * *.' The advantages of more convenient access to the particular lot of land in question, and of having a front upon a more desirable avenue, are direct benefits to that lot, giving it increased value in itself. It may be the same, in greater or less degree, with each and every lot of land upon the same street. But such advantages are direct and special to each lot. They are in no proper sense common because there are several estates, or many even, that are similarly benefited." 269 U.S. at 415-16, 70 L. Ed. at 344. (Emphasis supplied.)

Appendix A

[fol. 8] In *United States v. Crance*, 341 F.2d 161, (1965), the 8th Circuit said:

> "It is settled that special benefits do not become general merely because other lands in the area are similarly benefited." 341 F.2d at 167.

See also *United States v. Rands*, 389 U.S. 121, 126 (1967); *McCoy v. Union Elevated R.R.*, 247 U.S. 354, 364, 366, 62 L. Ed. 1156, 1165-66 (1918); and the cases gathered in the annotation in 145 A.L.R. 7 entitled *Eminent Domain — Deduction of Benefits.*

The evidence showed that when Davenport purchased the 49 acre parcel to insure access to the highway for the 24.85 acres which would remain in him, he paid the sum of $408 per acre. The Commission's valuation of $97,000 for the entire 218.80 acres that Davenport owned at the time of taking amounts to $443 per acre. The value put on the 74 acre remainder — $24,600 — amounts to $330 per acre after the taking. The first valuation should have been made without any enhancement because of the Priest Project, the second should have included something for the enhancement to the retained acres. Yet the Commission's valuation appears to do the reverse of what the law commands. Its report gives no explanation of why its valuation of the 74 acres is less than the per acre price paid by Davenport for the 49 acres he bought in anticipation of the condemnation. We find that the Commission erred in not applying proper legal standards and that its conclusion as to just compensation is clearly erroneous. *United States v. Trout*, 386 F.2d 216, 223 (5th Cir. 1967).

2. A final judgment should now be entered.

We come then to decide our disposition of this case; should we remand to the District Court and the Commission for further proceedings with the adversaries allowed, or required, to make a new record; should we require that the Court or Commission make findings of [fol. 9] fact on the record already made and elucidate the basis for such findings; or should we conclude this litigation without putting the litigants to further delay and expense? We believe that under 28 U.S.C. § 2106, we are privileged to do the latter in view of the record before us.

We have said that "the burden of proving the fair market value of the property rests with the landowner." *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969). We there obeyed the rules recited by the United States Supreme Court in *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 273, 87 L. Ed. 1390, 1396-97 (1943). One of appellee's value witnesses was himself, and without disclosing any qualifications and erroneously including only the original 170 acre parcel, he said his property had a market value of $155,000. He deducted from this figure the amount of $5,000 which by his evaluation of some 24.85 acres which were not to be taken by the government. It is clear that the commission attributed no probative value to Davenport's testimony. Not only did it acknowledge the erroneous basis for the valuation, but the Commission concluded;

"Mr. Davenport's testimony was undercut to a considerable extent, other than the natural overexuberance of a landowner, by the fact that he admitted on cross-examination his fair market value figure was pretty much a

'take it or leave it proposition.' In other words, the figure testified to was the amount which he personally would insist on before he would sell the property. This, of course, is not necessarily the fair market value of the property."

Davenport's idea of the value of the land to its owner, himself, had nothing to do with market value. See *United States v. Trout*, 386 F.2d 216, 223 n. 10 (5th Cir. 1967).

Mr. John J. Beck was the expert appraiser called by appellee Davenport. Again a fair reading of the [fol. 10] Commission's report discloses that no weight was given to his testimony. The Commission's report contains the following:

"The Commission finds Mr. Beck to be a fairly well informed witness, but deems his estimate as to value to be overly enthusiastic in this case. And, too, he did not include the 49 acres purchased by the landowners immediately prior to the date of taking either in assessing the before value of the property and in appraising the after value. Mr. Beck described the home on the subject property as being a 'nice country home,' and also stated that the general neighborhood was in a stage of rapid transition in which small tracts were being developed. He stated that comparable sales were very hard to find, and did not testify to any. This of course did not help his appraisal of the property with regards to its weight.

"Mr. Beck thought the fair market value of the property was $108,000 before the taking, without the 49 acres, of course, and that its after value was $4,600. He specifically stated that the $4,600 figure referred to the 24.85 acres, and that he gave it a very low value because it was landlocked interior property. When asked he stated

that he would upgrade his 'after' value $100 per acre if he had known it was not landlocked. This, of course, does not solve the dilemma of the Commission described above, since Mr. Beck gave no appraisal as to the fair market value of the 49 acres which was indeed left along with the 24.85 acres."

Apparently this witness was not aware that Davenport had acquired an additional 49 acres. He therefore assumed that what would remain in Davenport's ownership was approximately 23 acres. He placed a value of $4,600 on this parcel, also assuming that it was landlocked. Taking this figure from $108,000 he came up with $104,400 (this should be $103,400) as the "total loss Mr. Davenport incurred." When he was informed that Davenport's purchase of 49 acres would remove from the 23 acres its blight of being landlocked, he speculated that it would be worth $100 more per acre than his original es-
[fol. 11] timate of $4,600. We share the Commission's view that this witness' testimony was obviously worthless.

As for the government expert, Robert H. Stroube, the Commission's report says:

"Mr. Stroube has testified before the Commission many times, and the Commission is aware that since 1964 he has done nothing but appraise properties in the area of the Percy Priest Dam and Reservoir Project. The Commission deems him to be a knowledgeable and helpful witness. Because he was apparently instructed to appraise the 'after' value of the subject property considering the reservoir enhancement, his testimony is considerably undercut in the case at bar. The landowners insisted that the Commission should ignore his testimony altogether, but although the Commission gives it

much less weight than it would otherwise do, it is felt that there is not sufficient warrant to ignore completely the testimony of Mr. Stroube. Indeed, by ignoring Mr. Stroube's comparable sales which were used to show the after value, and which did involve reservoir enhancement, Mr. Stroube's appraisal does become meaningful and helpful.

"Mr. Stroube thought that the total amount of property owned by the landowners 218.8 acres, had a fair market value on the date of taking of $80,000 and that the value of the 74 acres remaining, which did enjoy reservoir enhancement value, was $30,000. Thus he thought that the fair market value of the property before the taking, with no reservoir enhancement value, was $366 per acre, and that its value after was $400 per acre."

Thus the Commission found that the only fault with Stroube's appraisal was his inclusion in the after taking value of the 74 acres retained by Davenport, of the increment of enhanced value that accrued to them because of their proximity to and unobstructed view of the projected dam and lake. We have said, and hold, that Stroube was correct in this regard. Thus the only testi-
[fol. 12] mony which has probative value and discloses the proper compensation to which appellee is, and was, entitled stands unimpaired on the record. We do not consider that the Commission, after viewing the involved property, could substitute its own idea of value for probative evidence. *United States v. Merz*, 376 U.S. 192, 198 (1964); *Government of Virgin Islands v. 2.6912 Acres of Land*, 396 F.2d 3, 5 (3rd Cir. 1968). We believe that the record made provides adequate material upon which to base a final and just determination. The condemnees have had their day in court and we visit no injustice upon them by exercising the authority which is ours

under 28 U.S.C. § 2106. *Moses Lake Homes, Inc. v. Grant County*, 276 F.2d 836, 853 (9th Cir. 1960); *Mefford v. Gardner*, 383 F.2d 748, 758 (6th Cir. 1967); 14 Cyc. Fed. Proc. § 68.98, p. 523.

We, therefore, reverse the judgment heretofore entered and remand the cause to the District Court for entry of a judgment fixing the just compensation to which the landowners, appellees herein, are entitled at the sum of $50,000. Costs on appeal are awarded to the government. Disposition of taxable costs in the District Court will be made by the District Judge.